

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re NATIONAL PRESCRIPTION OPIATE LITIGATION)	No. 1:17-md-2804
)	
)	Judge Dan A. Polster
)	
This Document Relates To:)	
)	
TRACK ONE CASES.)	
)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO FILE
SUR-REPLY IN OPPOSITION TO PLAINTIFFS' REPLY IN SUPPORT OF MOTION
FOR ENTRY OF ORDER ESTABLISHING COMMON BENEFIT

In their motion (ECF No. 3228), Defendants¹ contend that a sur-reply in opposition to Plaintiffs' reply in support of motion for entry of order establishing common benefit is warranted because: (i) Plaintiffs' reply (ECF No. 3212) is three times the length of their opening brief; (ii) Plaintiffs attach a Revised Proposed Corrected Order Establishing Common Benefit Fund; and (iii) the reply raises new arguments. These assertions are incorrect. **First**, Plaintiffs filed a mere 14-page reply in response to over 90 pages of oppositions, collectively responding to the main arguments they raised and clarifying any misunderstandings about the proposed order. Defendants cannot

¹ The motion was submitted by the following defendants: AmerisourceBergen Corporation; AmerisourceBergen Drug Corporation; Cardinal Health, Inc.; Cardinal Health 110, LLC; McKesson Corporation; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc.; Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc.; Andia, Inc.; Actavis Elizabeth LLC; Actavis Laboratories FL, Inc., and f/k/a Watson Laboratories, Inc.-Florida; Actavis Laboratories UT, Inc. f/k/a Watson Laboratories, Inc.-Salt Lake City; Actavis LLC; Actavis Mid Atlantic LLC; Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.; Actavis South Atlantic LLC; Actavis Totowa LLC; Actavis Kadian LLC; Cephalon, Inc.; Discount Drug Mart, Inc.; Endo Health Solutions Inc.; Endo Pharmaceuticals Inc.; Par Pharmaceutical, Inc.; Par Pharmaceutical Companies, Inc.; H. D. Smith, LLC, f/k/a H. D. Smith Wholesale Drug Co.; Henry Schein, Inc.; Henry Schein Medical Systems, Inc.; Noramco, Inc.; Prescription Supply Inc.; Teva Pharmaceuticals USA, Inc.; Warner Chilcott Company, LLC; and Watson Laboratories, Inc.

credibly argue that such length was unreasonable. **Second**, while Plaintiffs did attach a revised proposed order, such revisions were only made to address the concerns raised in the oppositions and to clarify any misunderstandings. **Third**, in their reply, Plaintiffs responded to the arguments raised in the objections; they did not offer new arguments. “This is entirely consistent with the proper purpose of a reply brief, to address the opposing party’s arguments raised in a response brief.” *Liberty Legal Found. v. Nat’l Democratic Party of the USA, Inc.*, 875 F. Supp. 2d 791, 797-98 (W.D. Tenn. 2012). In their sur-reply, Defendants cite no new arguments, instead reiterating their own and acknowledging that Plaintiffs sought to distinguish the cases they cited. *See, e.g.*, ECF No. 3228-1 at 1-2.

Even the case they cite in support of their motion acknowledges that “[s]ur-replies are permitted **only in rare cases** where a movant improperly raises new arguments in a reply.” *Eldridge v. Cardif Life Ins. Co.*, 266 F.R.D. 173, 175 (N.D. Ohio 2010) (internal citation omitted; emphasis added). Indeed, “[t]he local rules of this District do not provide for the filing of sur-replies,” and “[a] party’s mere desire to make new arguments, rather than respond to new arguments improperly raised in a reply, is not a valid reason for the court to grant leave to file a sur-reply.” *Chartis Specialty Ins. Co. v. Lubrizol Corp.*, No. 1:11 CV 369, 2013 WL 12130642, at *4 (N.D. Ohio Mar. 29, 2013). “As many courts have noted, ‘[s]ur-replies . . . are highly disfavored, as they usually are a strategic effort by the nonmoving party to have the last word on a matter.’” *Liberty Legal Found.*, 875 F. Supp. 2d at 797 (internal citation omitted).

Defendants offer no valid reason why their motion for leave to file sur-reply should be granted. Should any further briefing be warranted on any particular issue, such order should come from this Court.

Dated: March 17, 2020

Respectfully submitted,

/s/ Paul J. Hanly, Jr.
Paul J. Hanly, Jr.
SIMMONS HANLY CONROY
112 Madison Avenue, 7th Floor
New York, NY 10016
(212) 784-6400
(212) 213-5949 (fax)
phanly@simmonsfirm.com

Joseph F. Rice
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
(843) 216-9000
(843) 216-9290 (Fax)
jrice@motleyrice.com

Paul T. Farrell, Jr., Esq.
FARRELL LAW
422 Ninth Street
Huntington, WV 25701
(304) 654-8281
paul@farrell.law

Plaintiffs' Co-Lead Counsel

Peter H. Weinberger (0022076)
SPANGENBERG SHIBLEY & LIBER
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114
(216) 696-3232
(216) 696-3924 (Fax)
pweinberger@spanglaw.com

Plaintiffs' Liaison Counsel

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2020, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. Copies will be served upon counsel of record by, and may be obtained through, the Court CM/ECF system.

/s/ Peter H. Weinberger
Peter H. Weinberger